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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 STANFORD PAUL BRYANT, ) Civil No. 08cv02318 W(RBB)  
12 )  
13 Plaintiff, ) **ORDER REGARDING DISCOVERY**  
14 v. ) **MOTIONS [ECF NOS. 53, 56, 66,**  
15 T. ARMSTRONG, Correctional ) **71, 74, 82, 86]**  
16 Officer; et al., )  
17 Defendants. )  
\_\_\_\_\_ )

18 On December 12, 2008, Plaintiff Stanford Paul Bryant, a state  
19 prisoner proceeding pro se and in forma pauperis, filed a Complaint  
20 pursuant to 42 U.S.C. § 1983 [ECF No. 1]. Bryant filed a First  
21 Amended Complaint on March 3, 2009 [ECF No. 3], and a Second  
22 Amended Complaint on June 23, 2010 [ECF No. 39].

23 Following several motions to dismiss, Defendants Armstrong,  
24 Catlett, Janda, Lizarraga, Ochoa, and Trujillo filed an Answer to  
25 the Second Amended Complaint on April 29, 2011 [ECF No. 49]. The  
26 Court subsequently held a case management conference and the  
27 parties commenced discovery [ECF Nos. 51-52]. Cross-motions for  
28 summary judgment are currently pending [ECF Nos. 91-92]. All

1 pretrial dates have been vacated, pending a ruling on the summary  
2 judgment motions [ECF No. 104].

3 Also pending before the Court are Plaintiff's seven motions to  
4 compel discovery from four of the six remaining Defendants [ECF  
5 Nos. 53, 56, 66, 71, 74, 82, 86].<sup>1</sup> The Court finds the motions to  
6 compel suitable for resolution on the papers, pursuant to Civil  
7 Local Rule 7.1. See S.D. Cal. Civ. R. 7.1(d)(1). For the reasons  
8 stated below, Bryant's motions are **GRANTED** in part and **DENIED** in  
9 part.

10 I.

11 **FACTUAL BACKGROUND**

12 The Plaintiff contends in count one that Defendant Armstrong  
13 violated the Equal Protection Clause by discriminating against  
14 Bryant because of his race. (Second Am. Compl. 13, 16-17, ECF No.  
15 39.)<sup>2</sup> The Defendant allegedly scheduled Plaintiff and other  
16 African-American inmates to attend the law library during times  
17 that conflicted with their yard recreation; in contrast, Armstrong  
18 scheduled Hispanic inmates for law library time that did not  
19 interfere with yard time. (Id. at 13-17.)

20 In count two, Bryant argues that Defendant Armstrong  
21 retaliated against him for submitting an inmate grievance against  
22 Armstrong for racial discrimination. (Id. at 19-20.) According to  
23 Bryant, Armstrong retaliated by filing a false "Information  
24 Chrono." (Id. at 22.)

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26 <sup>1</sup> The Court will cite to each discovery motion using the page  
27 numbers assigned by the electronic case filing system.

28 <sup>2</sup> Because Bryant's Second Amended Complaint is not  
consecutively paginated, the Court will also cite to it using the  
page numbers assigned by the electronic case filing system.

1 The Plaintiff argues in count three that after he and another  
2 inmate submitted grievances against Armstrong, Defendant Lizarraga  
3 retaliated against Bryant and other African-American prisoners by  
4 moving them to more restrictive cell placements, threatening  
5 Plaintiff, and filing a false disciplinary report and rule  
6 violation charge against Bryant. (Id. at 25-30.) Further,  
7 Defendant Trujillo purportedly falsified a report and refused to  
8 permit the Plaintiff to call witnesses at his disciplinary hearing.  
9 (Id. at 34.) Defendants Catlett, Janda, and Ochoa sanctioned the  
10 retaliatory conduct of Armstrong, Lizarraga, and Trujillo. (Id. at  
11 41.)

12 Finally, in count four, Plaintiff alleges that Defendants  
13 Armstrong, Lizarraga, and Trujillo violated California Civil Code  
14 sections 52.1, 51.7, and 52(b) by interfering with Bryant's  
15 constitutional rights because of his race. (Id. at 43.) Armstrong  
16 and Lizarraga threatened violence against Plaintiff if he continued  
17 to discuss or pursue grievances alleging racial discrimination.  
18 (Id. at 43-44.) Lizarraga is claimed to have "committed an act of  
19 violence" against Plaintiff by removing legal documents from his  
20 cell without permission. (Id. at 44.) Similarly, Bryant contends  
21 that Defendant Trujillo intimidated Plaintiff by having three  
22 Hispanic officers surround him in a "menacing manner." (Id. at  
23 44-45.)

## II.

## LEGAL STANDARDS

26           It is well established that a party may obtain discovery  
27 regarding any nonprivileged matter that is relevant to any claim or  
28 defense. Fed. R. Civ. P. 26(b)(1). Relevant information need not

1 be admissible at trial so long as the discovery appears to be  
 2 reasonably calculated to lead to the discovery of admissible  
 3 evidence. Id. Relevance is construed broadly to include any  
 4 matter that bears on, or reasonably could lead to other matter that  
 5 could bear on, any issue that may be in the case. Oppenheimer  
 6 Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (citing Hickman v.  
 7 Taylor, 329 U.S. 495, 501 (1947)) (footnote omitted). Rule 37 of  
 8 the Federal Rules of Civil Procedure authorizes the propounding  
 9 party to bring a motion to compel responses to discovery. Fed. R.  
 10 Civ. P. 37(a)(3)(B). The party opposing the discovery bears the  
 11 burden of resisting disclosure. Miller v. Pancucci, 141 F.R.D.  
 12 292, 299 (C.D. Cal. 1992).

### 13 III.

#### 14 DISCUSSION

#### 15 A. Defendant Ochoa: Motion to Compel Responses to Document 16 Requests 1, 2, 3, and 4 (Set One) [ECF No. 53]

17 Plaintiff filed a "Motion for an Order to Compel Discovery,"  
 18 in which he seeks an order compelling Defendant Ochoa to respond to  
 19 requests for production of documents 1, 2, 3, and 4 in set one [ECF  
 20 No. 53]. Defendant T. Ochoa's Opposition to Plaintiff's Motion for  
 21 an Order to Compel Discovery was later filed, along with a  
 22 declaration of John P. Walters [ECF No. 57]. "Plaintiff's Reply to  
 23 Defendants' Opposition to Plaintiff's Motion for an Order to Compel  
 24 Discovery" was also filed [ECF No. 60].

25 In request for production of documents 1, Bryant seeks "[a]ny  
 26 and all documents and writings, as 'writings' is defined by Federal  
 27 Rules of Evidence 1001 that discloses [sic] the contents of any and  
 28 all questions, answers or statements resulting from any and all

1 inquiries made in Appeal log #CAL-A-08-00207 . . . ." (Mot. Order  
2 Compel Disc. Ochoa 4, ECF No. 53.) Request 2 is identical to  
3 request 1, except it relates to appeal log #CAL-A-08-00311. (Id.  
4 at 11-12.) Requests 3 and 4 are also identical, but they concern  
5 appeal logs #CAL-A-08-02223 and #CAL-A-08-01027, respectively.  
6 (Id. at 12.) Defendant Ochoa objects that all four document  
7 requests are vague and ambiguous. (Id. at 16-17.) Defendant also  
8 states that a diligent search was undertaken and that all  
9 responsive documents within Ochoa's control have been provided.  
10 (Id.)

11 In his Motion to Compel, Bryant maintains that Ochoa  
12 improperly failed to produce any records even though they are part  
13 of Calipatria's investigative files and therefore in Ochoa's  
14 possession. (Id. at 4.) Defendant's responses are incomplete  
15 because Plaintiff has received documents that "indicate that there  
16 [were] several 'inquiries' conducted as a result of [Bryant's]  
17 grievances Log Nos. Cal-A-08-00207, #Cal-A-08-00311, and  
18 #Cal-A-08-01027." (Id. at 9.) Plaintiff argues that Ochoa signed  
19 related "Confidential Supplement to Appeals" documents on April 5,  
20 2008, and July 27, 2008. (Id.) Any attempt by Ochoa to claim that  
21 the documents do not exist, Bryant contends, is therefore evasive.  
22 (Id. at 6.)

23 **1. Timeliness of Defendant's responses and objections**

24 Plaintiff submits in his declaration that he served Ochoa with  
25 a set of document requests on June 15, 2010. (Id. at 8.) This  
26 Court subsequently stayed all discovery pending resolution of the  
27 then-pending motion to dismiss. (Id.) Yet, according to Bryant,  
28 Ochoa did not respond to the discovery until nearly two months

1 later on June 1, 2011. (Id. at 5.) Therefore, Plaintiff urges  
2 that Ochoa has waived his objections by failing to timely respond  
3 to the discovery requests. (Id.)

4 In his Opposition, Defendant argues that Bryant misinterprets  
5 the Court's order staying discovery and he does not specify what  
6 dates or deadlines he uses to assert the responses were almost two  
7 months late. (Def. T. Ochoa's Opp'n 2, ECF No. 57.) According to  
8 the Defendant, Plaintiff served the document requests on June 15,  
9 2010, and on July 14, 2010, the Court issued a minute order staying  
10 all discovery pending a ruling on the motion to dismiss. (Id.)  
11 Then, on January 7, 2011, in its Report and Recommendation, "the  
12 Court stayed all discovery 'pending the motion to dismiss.'" (Id.)  
13 Ochoa represents, "No further details were given." (Id.)  
14 Defendant asserts that on February 11, 2011, the district court  
15 issued an order on the motion to dismiss, and Defendants filed an  
16 Answer on April 29, 2011. (Id.)

17 Ochoa submits, "Thus, the orders stayed discovery pending the  
18 motion to dismiss, but did not specify any exact date or method for  
19 resuming discovery." (Id.) On May 2, 2011, defense counsel mailed  
20 a letter to Bryant concerning the discovery and suggested that,  
21 because the stay was lifted, Plaintiff's first set of document  
22 requests be deemed served that day and a response would be due May  
23 31, 2011. (Id.) Counsel asked Plaintiff to advise him of any  
24 objections to the proposal. (Id.) Defendant served his responses  
25 to the discovery requests on May 24, 2011. (Id.) Accordingly,  
26 Ochoa maintains that his responses were timely served, and no  
27 objections were waived. (Id. at 3.)  
28

1 In his Reply, Bryant urges that Ochoa misstates the record.  
2 (Pl.'s Reply Defs.' Opp'n 2, ECF No. 60.) Plaintiff points out  
3 that this Court specifically stayed discovery until thirty days  
4 after the district court issued an order on Defendants' motion to  
5 dismiss. (Id.) Bryant asserts, "The Defendant Ochoa does not  
6 claim that he did not have knowledge of this Court's order or the  
7 specific date that the district court judge issued the order on  
8 Defendant's Motion to Dismiss, in fact Defendant Ochoa cites the  
9 specific date which the district court judge issued the order  
10 . . . ." (Id.)

11 On July 2, 2010, Defendants filed a Motion for a Protective  
12 Order to Stay Discovery Pending the Motion to Dismiss [ECF No. 41].  
13 On July 15, 2010, this Court issued a temporary stay of discovery,  
14 pending resolution of the Motion to Dismiss and the Motion for a  
15 Protective Order [ECF No. 42]. In their Motion for a Protective  
16 Order, the Defendants alleged that on June 15, 2010, after  
17 Plaintiff filed his Second Amended Complaint but before Defendants  
18 moved to dismiss, Plaintiff served five sets of discovery on  
19 Defendants. (Mot. Protective Order Attach. #1 Mem. P. & A. 2, ECF  
20 No. 41.) The Defendants maintained that all discovery should be  
21 stayed until their motion to dismiss was resolved. (Id. at 3.)

22 This Court, on January 7, 2011, recommended that the motion to  
23 dismiss be granted in part and denied in part and ordered that all  
24 discovery be stayed [ECF No. 46]. As to the Defendants' request  
25 for a protective order, the Court explicitly stated:

26 Applying these guidelines, a temporary stay on  
27 discovery until resolution of the Motion to Dismiss is  
28 appropriate. Defendants filed this Motion after they  
were served with discovery and met with Plaintiff in an  
attempt to resolve the issue. Defendants do not seek a

1 protective order that will remain in effect after their  
2 Motion to Dismiss is resolved, or until any  
3 answer is filed; they merely request that discovery be  
4 stayed until the Motion to Dismiss is ruled upon.

5 (Order Granting Defs.' Mot. Protective Order 42, ECF No. 46  
6 (internal citations omitted).)

7 The Court addressed the duration and extent of the stay as  
8 follows:

9 Defendants have shown good cause to stay discovery  
10 pending a ruling on their Motion to Dismiss. A stay of  
11 all discovery shall be in effect from the date this  
12 Report and Recommendation is filed until thirty days  
13 after the district court judge issues an order on  
14 Defendants' Motion to Dismiss Plaintiff's Second Amended  
15 Complaint [ECF No. 40].

16 (Id. (internal citations omitted).)

17 In his Opposition, Ochoa references this January 7, 2011 Order  
18 staying all discovery and represents that "the Court stayed all  
19 discovery 'pending the motion to dismiss[]'" yet misrepresents that  
20 "[n]o further details were given." (Def. T. Ochoa's Opp'n 2, ECF  
21 No. 57.) Ochoa continues, "Thus, the orders stayed discovery  
22 pending the motion to dismiss, but did not specify any exact date  
23 or method for resuming discovery." (Id.) This is a flagrant  
24 misrepresentation of the record. Either Defendant and his attorney  
25 failed to read the order to which they repeatedly and explicitly  
26 rely, or they deliberately misled the Court. Both possibilities  
27 are disconcerting.

28 In any event, Defendant Ochoa's responses are untimely.  
29 Because the district court issued its ruling on the motion to  
30 dismiss on February 11, 2011 [ECF No. 47], the stay of discovery  
31 was in effect for thirty days, or until March 14, 2011, as March  
32 13, 2011, fell on a Sunday. (See Order Granting Defs.' Mot.



1 Protective Order 42, ECF No. 46); see also Fed. R. Civ. P.  
2 6(a)(1)(C); S.D. Cal. Civ. R. 7.1(c). Ochoa ignored Plaintiff's  
3 discovery requests until May 2, 2011, when defense counsel mailed  
4 Bryant a letter referencing the stay and suggesting that the  
5 discovery be deemed served that day. (See Def. T. Ochoa's Opp'n  
6 Attach. #1 Decl. Walters 5, ECF No. 57.) Plaintiff did not receive  
7 Defendant's objections and responses until June 1, 2011, which is  
8 seventy-nine days after the stay expired. Ochoa's responses to  
9 document requests 1, 2, 3, and 4 in set one are untimely.

10 Unlike Rule 33, which governs interrogatories to parties, Rule  
11 34 of the Rules of Civil Procedure does not provide that a  
12 responding party waives an objection not timely stated. Compare  
13 Fed. R. Civ. P. 33(b)(4), with Fed. R. Civ. P. 34(b)(2)(C).  
14 Nevertheless, generally, when a party fails to provide any response  
15 or objection to interrogatories or document requests, courts deem  
16 all objections waived and grant a motion to compel. See Richmark  
17 Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir.  
18 1992) (finding that a party who failed to timely object to  
19 interrogatories and document production requests waived any  
20 objections); 7 James Wm. Moore, et al., Moore's Federal Practice, §  
21 33.174[2], at 33-106, § 34.13[2][a], at 34-56 to 34-56.1 (3d ed.  
22 2012). "It is well established that a failure to object to  
23 discovery requests within the time required constitutes a waiver of  
24 objection." Richmark, 959 F.2d at 1473.

25 Although the discovery stay was in effect through March 14,  
26 2011, Ochoa did not serve his objections and responses until May  
27 24, 2011, and Bryant did not receive them until June 1, 2011,  
28 roughly one and one-half months late. Accordingly, Ochoa has

1 waived any objections and Plaintiff's document requests 1, 2, 3,  
2 and 4 in set one [ECF No. 53].

3 In response to a request for production of documents under  
4 Rule 34 of the Federal Rules of Civil Procedure, a party is to  
5 produce all relevant documents in his "possession, custody, or  
6 control." Fed. R. Civ. P. 34(a)(1). A party may be required to  
7 produce a document that is in the possession of a nonparty entity  
8 if the party has the legal right to obtain the document. Soto v.  
9 City of Concord, 162 F.R.D. 603, 619 (N.D. Cal. 1995). The term  
10 "control" is broadly construed, and it includes documents that the  
11 responding party has the legal right to obtain from third parties.  
12 See id. (citations omitted); 7 James Wm. Moore, et al., Moore's  
13 Federal Practice, § 34.14[2][b], at 34-73 to 34-75 (footnotes  
14 omitted).

15 "[W]hen a response to a production of documents is not a  
16 production or an objection, but an answer, the party must answer  
17 under oath." 7 James Wm. Moore, et al., Moore's Federal Practice,  
18 § 34.13[2][a], at 34-57 (footnote omitted). Similarly, if a  
19 responding party contends that documents are not in its custody or  
20 control, the court may require more than a simple assertion to that  
21 effect. See id. § 34.14[2][a], at 34-73 (footnote omitted); see  
22 also Schwartz v. Marketing Publ'g Co., 153 F.R.D. 16, 21 (D. Conn.  
23 1994) (citing cases establishing that the absence of possession,  
24 custody, or control of documents that have been requested must be  
25 sworn to by the responding party).

26 Here, Ochoa responded to document requests 1, 2, 3, and 4 by  
27 stating that he has produced all relevant records that are in his  
28 possession or control. It is not clear that the Defendant took

1 reasonable steps under the above standards to locate relevant  
2 records. Plaintiff's Motion to Compel further responses to these  
3 requests [ECF No. 53] is **GRANTED**. Ochoa must supplement his  
4 responses and produce additional documents in his custody or  
5 control that reflect inquiries and related investigations conducted  
6 in response to Plaintiff's four grievances, as well as all  
7 supplemental appeals documents, including any allegedly signed by  
8 Ochoa. If there are no other responsive documents in Defendant's  
9 possession, custody, or control, after conducting this further  
10 attempt to locate records, Ochoa must state so under oath and  
11 describe efforts he made to locate responsive documents. See  
12 Vazquez-Fernandez v. Cambridge Coll., Inc., 269 F.R.D. 150, 155 (D.  
13 P.R. 2010).

14 **B. Defendant Armstrong: Motion to Compel Responses to**  
15 **Interrogatories 1, 2, and 3 (Set One) and Document Requests 1,**  
**2, and 3 (Set One) [ECF No. 56]**

16 Next, Plaintiff filed a "Motion for an Order to Compel  
17 Discovery" with a supporting brief and a declaration of Stanford P.  
18 Bryant, in which he seeks an order compelling Defendant Armstrong  
19 to respond to interrogatories 1, 2, and 3 in set one as well as  
20 document requests 1, 2, and 3 in set one [ECF No. 56]. Defendant  
21 T. Armstrong's Opposition to Plaintiff's Motion for an Order to  
22 Compel Discovery was filed in response, along with a declaration of  
23 John P. Walters [ECF No. 59]. "Plaintiff's Reply to Defendants'  
24 Opposition to Plaintiff's Motion for an Order to Compel Discovery"  
25 was also filed [ECF No. 70].

26 **1. Interrogatory 1**

27 In interrogatory 1, Bryant asks Correctional Officer  
28 Armstrong, "State any and all reasons why you no longer work for

1 CDCR at Calipatria State Prison." (Mot. Order Compel Disc.  
2 Armstrong Attach. #2 Decl. Bryant 4, ECF No. 56.) Armstrong  
3 objected that the information was not relevant, the interrogatory  
4 lacks foundation, and it should be excluded under Federal Rule of  
5 Evidence 403. (Id. at 13.) Defendant further objected that the  
6 question invades her right to privacy under California Penal Code  
7 §§ 832.7 and 832.8, and seeks information that is privileged and  
8 confidential. (Id.)

9 In his Motion to Compel, Bryant asserts he believes that  
10 Defendant no longer works at Calipatria because she was arrested  
11 for committing criminal acts with, or on behalf of, the "Southern  
12 California Hispanic Street gang(s)," and she was fired from CDCR as  
13 a result. (Id. Attach. #1 Br. 3.) Plaintiff argues that Armstrong  
14 has conceded in response to document request 1 that she is no  
15 longer employed by CDCR. (Id.) Bryant maintains that this  
16 interrogatory seeks relevant information that could lead to  
17 evidence bearing on Defendant's intent to discriminate against  
18 African-American inmates and favor Hispanic inmates. (Id. at 3-4.)

19 Although Armstrong raised multiple objections when initially  
20 responding to the interrogatories, the Court will only address the  
21 ones she elected to pursue when opposing this Motion. The  
22 Defendant now argues that interrogatory 1 seeks information  
23 regarding the personnel records of a correctional officer, which is  
24 confidential. (Def. T. Armstrong's Opp'n 2, ECF No. 59.)  
25 Armstrong submits, "In the context of disclosure of confidential  
26 peace officer records, federal courts are bound by California law."  
27 (Id. (citing Cal. Evid. Code § 1043).)

28

1                   **a. Privileged and confidential**

2           As preliminary matter, the Court must determine whether state  
3 or federal law applies to Defendant's assertion of privilege.  
4 Armstrong represents that federal courts must apply state privilege  
5 law as well as the procedures applicable to peace officers'  
6 personnel records and Pitchess motions.<sup>3</sup> (See Def. T. Armstrong's  
7 Opp'n 2, ECF No. 59.) This is an inaccurate statement of the law.

8           State privilege law does not govern discovery issues in  
9 federal § 1983 cases. See Kerr v. U.S. District Court for the N.  
10 Dist. of Cal., 511 F.2d 192, 197 (9th Cir. 1975), aff'd, 426 U.S.  
11 394 (1976); Crowe v. County of San Diego, 242 F. Supp. 2d 740,  
12 749-50 (S.D. Cal. 2003); Kelly v. City of San Jose, 114 F.R.D. 653,  
13 655-56 (N.D. Cal. 1987); see also Fed. R. Evid. 501; Miller, 141  
14 F.R.D. at 299. "In civil rights cases brought under federal  
15 statutes, questions of privilege are resolved by federal law."  
16 Hampton v. City of San Diego, 147 F.R.D. 227, 228, 230 (S.D. Cal.  
17 1993) (citing Kerr, 511 F.2d at 197); Miller, 141 F.R.D. at 298-99  
18 (comparing federal and California discovery rules at length,  
19 finding direct conflicts between them, and holding that federal  
20 discovery rules govern § 1983 civil rights actions). "This theme  
21 has been interpreted by the Ninth Circuit to include the discovery  
22 of personnel files, despite claims of state-created privileges."  
23 Miller, 141 F.R.D. at 297. Here, Armstrong applies the wrong legal  
24 standard altogether when arguing that each request seeks  
25 privileged, confidential information. (See Def. T. Armstrong's  
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28           <sup>3</sup> See Cal. Evid. Code § 1043; Cal. Penal Code § 832.7 (West  
2008); Pitchess v. Superior Court, 11 Cal.3d 531, 552 P.2d 305, 113  
Cal. Rptr. 897 (1974) ("Pitchess").

1 Opp'n 2, ECF No. 59). Notwithstanding this shortcoming,  
2 Defendant's objection fails under federal law.

3 Federal common law recognizes a qualified privilege for  
4 official information, such as information in government personnel  
5 files. Kerr, 511 F.2d at 197-98. Defendant Armstrong must comply  
6 with the procedural requirements for asserting the official  
7 information privilege. See Rackliffe v. Rocha, No. 1:07-cv-00603-  
8 AWI-DLB PC, 2012 U.S. Dist. LEXIS 57973, at \*10 (E.D. Cal. Apr. 6,  
9 2012) ("Defendants do not explain how the interrogatory . . . would  
10 violate official information privilege."); Williams v. Walker, No.  
11 CIV S-07-2385 WBS GGH P, 2009 U.S. Dist. LEXIS 122970, at \*24-26  
12 (E.D. Cal. Dec. 22, 2009) (explaining that to object to  
13 interrogatories on the basis of the official information privilege,  
14 an appropriately delegated prison official must personally consider  
15 the material requested and explain why it is privileged); Gonzalez  
16 v. City of Calexico, No. 03CV2005 WQH (PCL), 2006 U.S. Dist. LEXIS  
17 93144, at \*11-12 (S.D. Cal. Dec. 22, 2006) (stating requirements to  
18 invoke the official information privilege for interrogatories).

19 To determine whether information in government personnel files  
20 is subject to the official information privilege, federal courts  
21 weigh the potential benefits of disclosure against the potential  
22 disadvantages. Sanchez v. City of Santa Ana, 936 F.2d 1027,  
23 1033-34 (9th Cir. 1990). In civil rights cases against corrections  
24 officials, this balancing approach is moderately "pre-weight[ed] in  
25 favor of disclosure." Kelly, 114 F.R.D. at 661.

26 Before courts engage in this balancing, however, the party  
27 asserting the privilege must make a "substantial threshold  
28 showing." Soto, 162 F.R.D. at 613. Specifically, the party must

1 serve an objection to each discovery request that explicitly  
2 "invokes the official information privilege by name." Kelly, 114  
3 F.R.D. at 669. The withholding party must also serve the  
4 requesting party a privilege log or an equivalent that specifically  
5 identifies the information that is purportedly protected from  
6 disclosure. Hampton, 147 F.R.D. at 230. To support each  
7 objection, the party alleging privilege must submit an affidavit  
8 from a responsible official making several specific affirmations as  
9 to the confidentiality of the information. Kelly, 114 F.R.D. at  
10 669-70. If the nondisclosing party does not meet this initial  
11 burden of establishing cause to apply the privilege, the court must  
12 order disclosure of the documents; if the party meets this initial  
13 burden, the court generally conducts an in camera review of the  
14 material and balance each party's interests. Soto, 162 F.R.D. at  
15 613; Kelly, 114 F.R.D. at 671.

16 In Kelly, the court explained:

17 Unless the government, through competent declarations,  
18 shows the court what interests would be harmed, how  
19 disclosure under a protective order would cause the harm,  
20 and how much harm there would be, the court cannot  
21 conduct a meaningful balancing analysis. And because the  
22 burden of justification must be placed on the party  
invoking the privilege, a court that cannot conduct a  
meaningful balancing analysis because the government has  
not provided the necessary information would have no  
choice but to order disclosure.

23 Kelly, 114 F.R.D. at 669; see Chism v. County of San Bernadino, 159  
24 F.R.D. 531, 534-35 (C.D. Cal. 1994).

25 Here, assuming she is authorized to assert an official  
26 information claim of privilege, Defendant Armstrong has not met her  
27 burden of identifying the allegedly privileged information in her  
28 personnel file and the specific interests that would be threatened

1 by disclosure under a protective order. She failed to invoke the  
2 privilege by name or explain how information concerning the reasons  
3 she no longer works for CDCR would violate the federal qualified  
4 privilege. See Kelly, 114 F.R.D. at 672 (stating that generalized  
5 claims of harm are insufficient to satisfy the objecting party's  
6 burden); see Rackliffe, 2012 U.S. Dist. LEXIS 57973, at \*10.  
7 Armstrong also has not satisfied the other requirements for  
8 invoking the privilege.

9 Because this Court is unable to conduct a meaningful balancing  
10 analysis, it overrules the privilege objection and orders full  
11 disclosure. Kerr, at 669; see also Chism, 159 F.R.D. at 533  
12 ("Deputy Rick Roper's (Roper's) declaration in opposition to the  
13 motion does not meet the threshold requirements of showing cause  
14 why discovery should be denied under the official information  
15 privilege."). Bryant's Motion to Compel a response to  
16 interrogatory 1 is **GRANTED**.

## 17 **2. Interrogatory 2**

18 Plaintiff asks Defendant in interrogatory 2, "State any and  
19 all reasons why you were arrested." (Mot. Order Compel Disc.  
20 Armstrong Attach. #2 Decl. Bryant 4, ECF No. 56.) Again, Armstrong  
21 objected on relevance, foundation, evidentiary, privacy, privilege,  
22 and confidential grounds. (Id. at 13.) In her Opposition,  
23 however, Defendant only pursues the objections based on relevance,  
24 privilege and confidentiality, and vagueness.

### 25 **a. Relevance**

26 The Plaintiff maintains interrogatory 2 seeks relevant  
27 information because he believes Defendant was arrested for  
28 committing criminal acts in connection with the "Southern



1 California Hispanic Street gang(s)" and was fired from CDCR as a  
2 result. (Mot. Order Compel Disc. Armstrong Attach. #1 Br. 3, ECF  
3 No. 56.) Bryant argues the question could lead to information  
4 demonstrating Armstrong's tendency to show preference toward the  
5 "Surenos/Hispanic" gang members from Southern California, who are  
6 "violently opposed" to African-Americans. (Pl.'s Reply Armstrong's  
7 Opp'n 4, ECF No. 70.) The information could also establish  
8 Defendant's intent to discriminate against Bryant and other  
9 African-Americans prisoners. (Id. at 4-5.) In response, Armstrong  
10 argues in a conclusory manner that the reasons she was arrested are  
11 irrelevant. (Def. T. Armstrong's Opp'n 3, ECF No. 59.)

12 Interrogatory 2 seeks information that is relevant to Bryant's  
13 accusation that Armstrong intentionally discriminated against him  
14 through law library scheduling or lead to the discovery of  
15 admissible evidence, even though the evidence may not ultimately be  
16 admissible at trial. See Fed. R. Civ. P. 26(b)(1). For example,  
17 if Armstrong's prior arrest involved her affiliation with a race-  
18 oriented gang, the information could bear on whether she  
19 intentionally discriminated against Bryant on the basis of race.  
20 See Oppenheimer Fund, Inc., 437 U.S. at 351; see also Hampton, 147  
21 F.R.D. at 229 (discussing that personnel files and internal affairs  
22 histories may be relevant to issues of credibility or motive).  
23 Armstrong's relevance objection is overruled.

24 **b. Privileged and confidential**

25 Defendant Armstrong objects to interrogatory 2 by stating,  
26 "Further, the interrogatory is also objectionable to the extent it  
27 seeks disclosure of any information that may be in Armstrong's  
28 personnel file." (Def. T. Armstrong's Opp'n 3, ECF No. 59.)

1 Armstrong is incorrect. The interrogatory does not seek "any"  
 2 information in her personnel file. As discussed, although federal  
 3 common law recognizes a qualified privilege for official  
 4 information, Defendant has not properly invoked the privilege.  
 5 Soto, 162 F.R.D. at 613; Kelly, 114 F.R.D. at 669. This objection  
 6 is also overruled.

### 7 c. Vagueness

8 Bryant asks Armstrong to state the "reasons" she was arrested.  
 9 (Mot. Order Compel Disc. Armstrong Attach. #2 Decl. Bryant 4, ECF  
 10 No. 56.) The Defendant contends that the interrogatory is vague  
 11 because it calls her to speculate as to the "reasons" she was  
 12 arrested. (Def. T. Armstrong's Opp'n 3, ECF No. 59.)

13 "The party objecting to discovery as vague or ambiguous has  
 14 the burden to show such vagueness or ambiguity." Swackhammer v.  
 15 Sprint Corp., 225 F.R.D. 658, 662 (D. Kan. 2004) (footnote  
 16 omitted). The responding party should exercise common sense and  
 17 attribute ordinary definitions to terms in discovery requests. Id.  
 18 (footnote omitted). A common sense definition of "reasons" would  
 19 entail the legal bases for Defendant's arrest. See id. Bryant's  
 20 interrogatory is not vague, and the Motion to Compel a further  
 21 response to interrogatory 2 is **GRANTED**.

### 22 3. Interrogatory 3

23 In interrogatory 3, Plaintiff asks Armstrong, "State where  
 24 inmate Teklezi H. Gebrezgiaber is presently housed  
 25 (I[n]stitution/Prison)." (Mot. Order Compel Disc. Armstrong  
 26 Attach. #2 Decl. Bryant 4, ECF No. 56.) The Defendant objected to  
 27 this interrogatory because it is not relevant, lacks foundation,  
 28 and should be excluded under Federal Rule of Evidence 403. (Id. at

1 13.) She also stated that without waiving these objections, "I do  
2 not know." (Id.)

3 Armstrong submits in her Opposition that the dispute regarding  
4 interrogatory 3 is moot because defense counsel has since informed  
5 Bryant where inmate Gebrezgiabar is housed. (Def. T. Armstrong's  
6 Opp'n 3, ECF No. 59.) Bryant does not indicate otherwise in his  
7 Reply. (See Pl.'s Reply Armstrong's Opp'n 4-6, ECF No. 70  
8 (addressing interrogatories 1 and 2).) In any event, Armstrong  
9 answered the interrogatory. Plaintiff's Motion to Compel a further  
10 response to interrogatory 3 is **DENIED** as moot.

#### 11 **4. Request for production of documents 1**

12 In document request 1, Bryant seeks all documents and writings  
13 that disclose the "contents of any and all procedures, policies, or  
14 directives" revealing "the scheduling of inmates housed in  
15 Calipatria State Prison's Administrative Segregation-Building 5 for  
16 law library access" that were in effect during Armstrong's tenure  
17 as "A5 Building Legal Officer." (Mot. Order Compel Disc. Armstrong  
18 Attach. #2 Decl. Bryant 8, ECF No. 56.) Armstrong objected because  
19 she lacks possession, custody, or control of the documents, as she  
20 is "not employed by CDCR, and has no access to any of the requested  
21 documents." (Id. at 19.)

#### 22 **a. Possession, custody, or control**

23 Bryant challenges Defendant's claim that she lacks access to  
24 the documents because she is not presently employed by CDCR. (Mot.  
25 Order Compel Disc. Armstrong Attach. #1 Br. 5, ECF No. 56.) The  
26 deputy attorney general representing Armstrong, John Walters, has  
27 access to the records because he represents all of the other  
28 Defendants who are presently employed by CDCR. (Id.; see Pl.'s

1 Reply Armstrong's Opp'n 6-7, ECF No. 70 (citing Pulliam v. Lozano,  
 2 No. 1:07-cv-964-LJO-MJS(PC), 2011 U.S. Dist. LEXIS 12593, at \*2  
 3 (E.D. Cal. Jan. 31, 2011)).) According to Bryant, the Defendants  
 4 "have no problem obtaining documents from the CDCR for the purpose  
 5 of preparing their defense." (Pl.'s Reply Armstrong's Opp'n 7, ECF  
 6 No. 70.) Bryant urges that Armstrong is in control of documents  
 7 showing scheduling policies because she is represented by the  
 8 Attorney General's Office. (Id.) The Defendant counters by  
 9 briefly stating that, as a former employee, she does not have  
 10 control over company documents. (Def. T. Armstrong's Opp'n 4, ECF  
 11 No. 59 (citing 7-Up Bottling Co. v. Archer Daniels Midland Co., 191  
 12 F.3d 1090, 1107 (9th Cir. 1999)).)

13 A party is deemed to have control over documents if he or she  
 14 has a legal right to obtain them. See Clark, 181 F.R.D. at 472;  
 15 see also 7 James Wm. Moore, et al., Moore's Federal Practice, §  
 16 34.14[2][b], at 34-73 to 34-75 (footnote omitted) ("The term  
 17 'control' is broadly construed."). A party responding to a  
 18 document request "'cannot furnish only that information within his  
 19 immediate knowledge or possession; he is under an affirmative duty  
 20 to seek that information reasonably available to him from his  
 21 employees, agents, or others subject to his control.'" Meeks v.  
 22 Parsons, No. 1:03-cv-6700-LJO-GSA, 2009 U.S. Dist. LEXIS 90283, at  
 23 \*11-12 (E.D. Cal. Sept. 18, 2009) (citation omitted).

24 Some courts have assumed that a party has control of documents  
 25 in the possession of another and ordered the party to produce  
 26 relevant documents. See Zackery v. Stockton Police Dep't, No. CIV  
 27 S-05-2315 MCE DAD P, 2007 U.S. Dist. LEXIS 44144, at \*11-12 (E.D.  
 28 Cal. June 7, 2007) ("directing" counsel for defendants to obtain

1 and produce records in the possession of their current employer,  
2 the Stockton Police Department). Yet, records in the possession of  
3 a former employer are further removed from the control of a former  
4 employee. In Lowe v. District of Columbia, 250 F.R.D. 36, 38  
5 (D.D.C. 2008), the district court stated that "[f]ormer employees  
6 of government agencies do not have 'possession, custody, or  
7 control' of documents held by their former employers." The burden  
8 of establishing control over the documents sought is on the party  
9 seeking production. United States v. Int'l Union of Petroleum &  
10 Indus. Workers, 870 F.2d 1450, 1452 (9th Cir. 1989); accord 7 James  
11 Wm. Moore et al., Moore's Federal Practice, § 34.14[2][b], at 34-  
12 77.

13 Bryant attempts to establish that Armstrong has control over  
14 Calipatria's law library scheduling policies by arguing that she  
15 and the other Defendants are represented by the Attorney General's  
16 Office, and the other Defendants are currently employed by CDCR.  
17 Plaintiff's argument would be stronger if the document request was  
18 directed at a Defendant who was currently employed by CDCR. See  
19 Pulliam, 2011 U.S. Dist. LEXIS 12593, at \*2. Yet, Bryant seeks the  
20 records from Armstrong, a former CDCR employee. The Plaintiff has  
21 not shown that Defendant has control over records in the custody of  
22 her former employer. Lopez v. Chertoff, No. CV 07-1566-LEW, 2009  
23 U.S. Dist. LEXIS 50419, at \*5 (E.D. Cal. June 2, 2009) ("[A]s a  
24 former employee of the Yolo County Public Defender's Office  
25 [defendant] neither has possession, custody, or control of  
26 documents held by his former employer, nor does he have the present  
27 ability to legally demand such documents.") Armstrong cannot be  
28 compelled to produce documents from an agency that previously

1 employed her when the records are not in her custody, possession,  
2 or control. Plaintiff's Motion to Compel a further response to  
3 document request 1 is **DENIED**.

4 **5. Request for production of documents 2**

5 In document production request 2, Bryant seeks all documents  
6 and writings that disclose the "contents of any and all questions,  
7 answers or statements resulting from any and all inquiries made"  
8 concerning the grievance submitted by inmate Teklezgi H.  
9 Gebrezgiaber "CDCR# T43976" on January 28, 2008. (Mot. Order  
10 Compel Disc. Armstrong Attach. #2 Decl. Bryant 8-9, ECF No. 56.)  
11 The Defendant objected on relevance, foundation, and evidentiary  
12 grounds, and because the requests invade inmate Gebrezgiaber's  
13 right to privacy. (Id. at 19-20.) Armstrong further responded by  
14 stating that she lacked possession, custody, or control over the  
15 requested documents because she is not employed by CDCR and lacks  
16 access to any of the material. (Id.)

17 **a. Possession, custody, or control**

18 Again, Plaintiff challenges Armstrong's contention that she is  
19 unable to access inquiries into inmate Gebrezgiaber's grievance  
20 because she is no longer employed at CDCR. (Id. Attach. #1 Br. 5.)  
21 As discussed above, however, the document request is directed at  
22 Defendant Armstrong – a former CDCR employee. She cannot be  
23 compelled to produce responsive records from agencies that  
24 previously employed and are not in her custody or possession. See  
25 Lowe, 250 F.R.D. at 38; see also Lopez, 2009 U.S. Dist. LEXIS  
26 50419, at \*5. Defendant's objection is sustained, and the Motion  
27 to Compel a response to document production request 2 is also  
28 **DENIED**.

1           **6. Request for production of documents 3**

2           Finally, in document request 3, Plaintiff asks for all  
3 documents and writings that reveal the "CDCR-Institution/Prison" in  
4 which inmate Teklezgi H. Gebrezgiaber (T43976) is currently housed.  
5 (Mot. Order Compel Disc. Armstrong Attach. #2 Decl. Bryant 9, ECF  
6 No. 56.) Armstrong objected on relevance, foundation, evidentiary,  
7 and privacy grounds. (*Id.* at 19-20.) Defendant also asserted she  
8 lacks possession or control over the records. (*Id.*)

9           In her Opposition, Armstrong maintains that this issue is moot  
10 because defense counsel has since provided Plaintiff with inmate  
11 Gebrezgiabar's current location. (Def. T. Armstrong's Opp'n 5, ECF  
12 No. 59.) In his Reply, Plaintiff does not contest Defendant's  
13 assertion that the dispute is moot. (*See* Pl.'s Reply Armstrong's  
14 Opp'n 6-7, ECF No. 70 (addressing document requests 1 and 2).)  
15 Therefore, Plaintiff's request for an order compelling a further  
16 response to document request 3 is **DENIED** as moot.

17       **C. Defendant Janda: Motion to Compel Responses to Document**  
18       **Requests 12 and 13 (Set One) ("Amended") [ECF No. 66]**

19           Next, Plaintiff filed a "Motion to Compel Discovery" seeking  
20 further responses from Defendant Janda to document requests 12 and  
21 13 in set one ("amended") [ECF No. 66]. Defendant G. Janda's  
22 Opposition to Plaintiff's Motion to Compel Discovery, along with a  
23 declaration of John P. Walters, was filed in response [ECF No. 76].  
24 Plaintiff then filed a "Notice of Defendant's Failure to Disclose  
25 Discovery" [ECF No. 78].

26           **1. Request for production of documents 12**

27           In document request 12, Bryant asks Associate Warden Janda to  
28 produce all "Calipatria State Prison's ASU #2 group yard tapes"

1 from February to July 2008. (Mot. Compel Disc. Janda 13, ECF No.  
2 66.) The Defendant objected to the request on foundation,  
3 relevance, and evidentiary grounds. (Id. at 20.)

4 Bryant asserts that he put Janda on notice of his request for  
5 these yard tapes when he filed a grievance asking Janda to  
6 investigate Plaintiff's complaints, which would include reviewing  
7 the Administrative Segregation Unit ("ASU") group yard videotapes.  
8 (Id. at 4.) In the grievance, Bryant asked that the tapes be  
9 preserved. (Id.) Plaintiff also notified Defendant of his need  
10 for the tapes on May 28 and June 5, 2008, when Bryant stated in his  
11 grievance, Log No. Cal-A-08-01027, that he sought "Group yard  
12 videos and yard assignment records," and that he intended to  
13 initiate civil litigation and would need the yard videotapes as  
14 evidence. (Id. at 4-5.) Plaintiff suspects that Janda likely has  
15 the videotapes but did not produce them because they were not in  
16 his favor; to now say the tapes do not exist is an attempt to  
17 withhold discovery. (Id. at 5.) Moreover, Bryant contends that  
18 defense counsel conceded in response to Plaintiff's meet-and-confer  
19 letter that the yard tapes are "generally not maintained," yet he  
20 did not state that the tapes do not exist. (Id. at 4.) The  
21 discovery is relevant, according to Bryant, because it will show  
22 that "Group yard No. 2" consisted of African-American inmates only,  
23 and the tapes will show the disparity of prisoners in ASU two, yard  
24 two, compared to the number of inmates in other yards. (Id. at 6.)

25 The Defendant counters that Plaintiff has not established that  
26 daily videotapes of the exercise yards over a six-month period are  
27 relevant to his claims. (Def. G. Janda's Opp'n 2, ECF No. 76.) In  
28 response to Plaintiff's meet-and-confer letter, Janda reiterated



1 his relevance objections. (Id.) Defense counsel did, however,  
2 also explain that there were no videos because they are only  
3 maintained in response to specific instances that occur on a given  
4 day. (Id.) Janda asserts that Bryant's request that the tapes be  
5 preserved, which was made in pre-litigation grievances, does not  
6 bear on the current discovery requests. (Id.) To clarify any  
7 misunderstanding, Defendant served Plaintiff a supplemental  
8 response to document request 12 stating that there are, in fact, no  
9 responsive videos. (Id. at 2-3.)

10 **a. Relevance**

11 In the Second Amended Complaint, Bryant asserts that there are  
12 two yards in "Ad-Seg #2," or ASU two – yard one and yard two.  
13 (Second Am. Compl. 13-14, ECF No. 39.) Yard one consisted of only  
14 Hispanic prisoners and yard two was comprised of only African-  
15 American inmates. (Id. at 14.) The Plaintiff also alleges that  
16 Defendant Lizarraga initiated a "campaign" of racially-motivated  
17 cell moves targeting African-American prisoners who were assigned  
18 to yard two in ASU two. (Id. at 26.) Lizarraga moved these  
19 inmates in retaliation to more restrictive cells located in ASU  
20 one. (Id.) As a result, the number of inmates in yard two, of ASU  
21 two, was reduced to three inmates, but similarly situated prisoners  
22 in other yards in ASU two were not moved and the numbers of inmates  
23 in those yards did not decrease. (Id.) Bryant was eventually  
24 moved by Defendant Lizarraga on July 7, 2008. (Id.)

25 Document production request 12 seeks videotapes for the "ASU  
26 #2 group yard" from February to July 2008. The footage, if it  
27 exists, could provide information regarding the races of different  
28 inmates, as well as the number of inmates, who attended yard

1 recreation at various times during the six-month period. It is  
 2 unclear whether the "group yard" refers to yards one and two. If  
 3 it does, the information could indicate whether yard two in ASU two  
 4 was comprised of only African-American inmates and whether yard one  
 5 was comprised of Hispanic inmates, as Plaintiff alleges. The  
 6 footage could also reveal the decreasing number of inmates assigned  
 7 to yard two as a result of Lizarraga's retaliatory cell moves,  
 8 compared to the number of prisoners assigned to other yards in ASU  
 9 two. To that extent, document request 12 seeks information that is  
 10 relevant to Bryant's claim that Lizarraga retaliated against him by  
 11 moving Plaintiff and the other yard two African-American inmates to  
 12 more restrictive cell placements. Janda's relevance objection is  
 13 overruled.

14 **b. Possession, custody, or control**

15 In his Motion, Plaintiff submits that although Associate  
 16 Warden Janda initially objected to document request 12 because it  
 17 does not seek relevant information, defense counsel John Walters  
 18 later suggested in a letter to Bryant that Janda does not possess  
 19 the videotapes. (Mot. Compel Disc. Janda 4-5, 33, ECF No. 66.) In  
 20 the letter, Walters states, "Defendant stands by these objections.  
 21 Further, as noted above, video tapes are generally not maintained  
 22 unless a specific event or incident happens on that date, in which  
 23 case they are maintained as evidence." (Id. at 33.)

24 When a party responds to a document request with an answer as  
 25 opposed to production or an objection, the party must answer under  
 26 oath. 7 James Wm. Moore, et al., Moore's Federal Practice, §  
 27 34.13[2][a], at 34-57 (footnote omitted); see id. § 34.14[2][a], at  
 28 34-73 (footnote omitted). If Defendant Janda's response is that

1 there is no relevant material in Defendant's control, he must state  
2 so under oath. See Vazquez-Fernandez v. Cambridge Coll., Inc., 269  
3 F.R.D. 150, 155 (D. P.R. 2010). Nevertheless, because Janda has  
4 not supplied an answer under oath, Plaintiff's Motion to Compel  
5 [ECF No. 66] a further response from Defendant Janda to document  
6 request 12 in set one ("amended") is **GRANTED**.

7 **2. Request for production of documents 13**

8 Request 13 asks Defendant to produce all "Calipatria State  
9 Prison's ASU #2 group yard 'Assignment Records,' setting forth the  
10 number of inmates assigned to each yard" from February to July  
11 2008. (Mot. Compel Disc. Janda 13, ECF No. 66.) Janda responded,  
12 "A diligent search is being undertaken for the requested items.  
13 Defendant will produce any documents within his possession,  
14 custody, or control to the extent any exist." (Id. at 20.)

15 Plaintiff asked Defendant for a specific date by which he  
16 would provide the responsive documents. (Id. at 4.) In response,  
17 Janda indicated that he would only provide Bryant with an "update"  
18 on the progress by a date certain, which was just two days before  
19 any motion to compel would have to be filed. (Id.) In Janda's  
20 Opposition, defense counsel submits that he has been attempting to  
21 locate the responsive documents and anticipates serving Bryant a  
22 supplemental response in approximately one week. (Def. G. Janda's  
23 Opp'n 3, ECF No. 76.) Janda argues that the Motion to Compel a  
24 response to document request 13 should therefore be denied as moot.  
25 (Id.)

26 Bryant subsequently filed a "Notice of Defendant's Failure to  
27 Disclose Discovery," in which he states that he received the  
28 supplemental response counsel referred to in the Opposition, but

1 the production is insufficient. (Notice Def. Janda's Failure  
2 Disclose 2, ECF No. 78.) Specifically, Plaintiff contends that  
3 Janda merely produced copies of handwritten notes by prison staff  
4 that do not disclose the number of inmates assigned to the yards;  
5 the notes only reveal the number of inmates who actually attended  
6 the yard on certain days. (Id.)

7 Document request 13 explicitly sought documents reflecting the  
8 yard "'Assignment Records,' setting forth the number of inmates  
9 assigned to each yard" from February to July 2008. (Mot. Compel  
10 Disc. Janda 13, ECF No. 66) (emphasis added). Janda did not object  
11 to the document request initially or in opposition to the Motion to  
12 Compel and has therefore waived any objection. See S.D. Cal. Civ.  
13 R. 7.1(f)(3)(c). Moreover, the yard assignment records are clearly  
14 relevant to Bryant's retaliation claim. Accordingly, the Defendant  
15 still has not disclosed documents showing the number of prisoners  
16 assigned to each yard during this time period; his supplemental  
17 production is not fully responsive and further production is  
18 warranted. Defendant Janda is to provide Bryant with all ASU group  
19 two yard assignment records showing the number of inmates assigned  
20 to each yard that are in Janda's possession, custody, or control.  
21 If there are no other responsive documents, the Defendant must,  
22 nevertheless, provide the answer under oath. See Vazquez-  
23 Fernandez, 269 F.R.D. at 155. Plaintiff's Motion to Compel a  
24 further response to document request number 13 is **GRANTED**.

25 **D. Defendant Lizarraga: Motion to Compel Responses to**  
26 **Interrogatories 11 and 12 (Set One) [ECF No. 71]**

27 In "Plaintiff's Motion to Compel Discovery," Bryant seeks an  
28 order compelling Defendant Lizarraga to respond to interrogatories

11 and 12 in set one [ECF No. 71]. Lizarraga filed an Opposition, along with a declaration of John P. Walters [ECF No. 77]. No reply was filed.

**1. Interrogatories 11 and 12**

Bryant asks Lizarraga in interrogatory 11 to state the races of the inmates assigned to "Calipatria State Prison - ASU #2's group yard No. 1" from January to July 2008. (Mot. Compel Disc. Lizarraga 13, ECF No. 71.) In interrogatory 12, Plaintiff asks Lizarraga to state the races of the prisoners assigned to "Calipatria State Prison - ASU #2's group yard No. 2" from January to July 2008. (Id.) Although Lizarraga responded separately to each interrogatory, his answers were identical:

I do not know, and I do not have possession, custody, or control over the documents that may assist in answering this interrogatory. First, inmates are not assigned to yard groups based on race. They are assigned based on affiliations. Second, in order to determine the race of each inmate in the yard group on each day within that seven-month period, the Yard Log Books must be checked for each day for a list of assigned inmates. The names and CDC numbers of each inmate would then have to be recorded, and used to check the individual Central file of each inmate to determine their race. Central files are maintained [sic] the prison that inmate is currently housed at.

(Id. at 20.)

Bryant now seeks an order compelling Lizarraga to supplement these answers. Plaintiff complains that Defendant did not state that he would, at a minimum, conduct a diligent search to locate information that could help him answer the questions. (Id. at 4.) According to Bryant, Lizarraga's claimed lack of knowledge of these inmates' races is disingenuous because he has worked in ASU two for several years. (Id. at 5.) Further, Bryant is only seeking the

1 races of the inmates within the specific time frame, not how those  
2 inmates were assigned to the yard group. (Id.)

3 The Plaintiff also challenges Lizarraga's asserted inability  
4 to obtain responsive information. (Id.) Bryant argues that he  
5 independently obtained several "Calipatria State Prison-  
6 Administrative Segregation Daily Yard Activity" forms from a  
7 correctional officer working in ASU two who simply walked over to  
8 the computer in the staff's office and downloaded the forms for  
9 Plaintiff. (Id.) One form indicates that the yard has "Controlled  
10 Compatible-Black, Northern Hispanic, and Other" inmates and that  
11 "Yard Group No. 2" is comprised of all African-American prisoners.  
12 (Id.) In any event, Plaintiff insists that Lizarraga can  
13 reasonably obtain the information because he has access to a  
14 computer inside of ASU two, and a counselor is present during the  
15 week who can download documents relating to inmate housing. (Id.  
16 at 6.)

17 Defendant Lizarraga counters that his responses to  
18 interrogatories 11 and 12 are sufficient. (Def. R. Lizarraga's  
19 Opp'n 2, ECF No. 77.) To determine the inmates' races, Defendant  
20 asserts he can not answer the questions by reviewing documents  
21 because he would have to review a list of the inmates assigned for  
22 each day during that time period, record their names and CDCR  
23 numbers, and then "cross-check" them with the central files, which  
24 are maintained by the prison where each inmate is currently housed.  
25 (Id.) "In short, there were no readily available sources for  
26 Lizarraga to check for the answers to the interrogatories, and  
27 Lizarraga could not travel up-and-down the state pulling Central  
28 files and investigating Plaintiff's discovery." (Id. (citing

1 Heilman v. Vojkufka, No. CIV S-08-2788 KJM EFB, 2011 U.S. Dist.  
2 LEXIS 26004, at \*36 (E.D. Cal. Feb. 17, 2011)).) Lizarraga submits  
3 that his response of "I don't know" is therefore sufficient. (Id.)

4 Defendant responds to Bryant's claim that there is an  
5 available source for Lizarraga to obtain responsive information by  
6 conceding that the "Daily Yard Activity" form that Plaintiff  
7 obtained does, in fact, exist. (Id. at 3.) Yet, this form is not  
8 available for the seven-month period in 2008 at issue; defense  
9 counsel alleges that he visited Calipatria and specifically looked  
10 for any available daily yard activity forms from 2008 but was  
11 unable to located any. (Id.; see id. Attach. #1 Decl. Walters 2.)  
12 Walters states that he was later informed that staff in the  
13 litigation coordinator's office did not have the forms and noted  
14 that they were "likely purged." (Id. Attach. #1 Decl. Walters 2.)

15 Defense counsel states that the only similar items available  
16 for that period was the "A5 Yard Gun Log Book" and the  
17 "Administrative Segregation Isolation Log Book," which are hard  
18 cover journals. (Id. at 3.) The yard gun log book for the  
19 relevant 2008 period shows the number of prisoners assigned to each  
20 yard, and the isolation log book details each inmate's name, CDCR  
21 number, and cell assignment, but not his race. (Id.) Despite  
22 these representations, Lizarraga urges that there is "no available  
23 document" for him to review to answer interrogatories 11 and 12.  
24 (Def. R. Lizarraga's Opp'n 3, ECF No. 77.)

25 "A party answering interrogatories has an affirmative duty to  
26 furnish any and all information available to the party." 7 James  
27 Wm. Moore, et al., Moore's Federal Practice, § 33.102[1], at 33-72  
28 (footnote omitted). Interrogatories must be answered "separately

1 and fully in writing under oath." Fed. R. Civ. P. 33(b)(3). If a  
2 responding party is unable to provide the requested information, he  
3 may not simply refuse to answer. Haworth v. Suryakant, No.  
4 1:06-cv-1373-LJO-NEW(TAG), 2007 U.S. Dist. LEXIS 48380, at \*5 (E.D.  
5 Cal. June 25, 2007) (quoting Hansel v. Shell Oil Corp., 169 F.R.D.  
6 303, 305 (E.D. Pa. 1996)). The responding party must state under  
7 oath that he is unable to provide the information and must describe  
8 the efforts he used to obtain the information. Id. (quoting  
9 Hansel, 169 F.R.D. at 305); see also 7 James Wm. Moore, et al.,  
10 Moore's Federal Practice, § 33.102[3], at 33-75 (footnote omitted).

11 Here, although Lizarraga has verified his responses to  
12 interrogatories 11 and 12 under oath, he has not explained why he  
13 is unable to provide the information or described the efforts he  
14 made to obtain the information, as required. The subsequent  
15 statements regarding the availability of the information are  
16 unverified and made by defense counsel in letters or in opposition  
17 to this Motion to Compel. This is not in compliance with Rule 33  
18 of the Federal Rules of Civil Procedure. Moreover, although  
19 Lizarraga's attorney has described the available means to ascertain  
20 the names, CDCR numbers, and cell assignments of the inmates housed  
21 in each yard for the seven-month period, Defendant has  
22 insufficiently asserted an inability to ascertain the races of  
23 these prisoners.

24 If Lizarraga is unable to determine the prisoners' races, he  
25 must state so under oath and describe the steps taken to answer  
26 interrogatories 11 and 12. See Frontier-Kemper Constructors, Inc.  
27 v. Elk Run Coal Co., 246 F.R.D. 522, 529 (S.D. W. Va. 2007)  
28 (finding that a responding party has a "severe duty" to make every



effort to obtain the requested information and, if unsuccessful, must provide an answer detailing the attempts made to ascertain the information). Bryant is entitled to supplemental, verified responses. Plaintiff's Motion to Compel responses to interrogatories 11 and 12 in set one from Defendant Lizarraga [ECF No. 71] is **GRANTED**.

**E. Defendants Armstrong and Ochoa: Motion to Compel Responses to Interrogatories 2 and 7 (Set Two) and Document Request 3 (Set Two) [ECF No. 74]**

The Plaintiff next filed a "Motion for an Order to Compel Discovery" in which he seeks to compel responses from Defendant Armstrong to interrogatory 2 and document request 3 in set two; Bryant also seeks to compel a response from Defendant Ochoa to interrogatory 7 in set two [ECF No. 74]. Defendants' Opposition to Plaintiff's Motion to Compel Discovery was filed in response, along with a declaration of John P. Walters [ECF No. 83]. Bryant did not file a reply.

**1. Armstrong**

In interrogatory 2, of set two, Plaintiff asks Armstrong to state the dates and times that Armstrong attended training classes from December 2007 to February 2008. (Mot. Compel Disc. Armstrong & Ochoa 11, ECF No. 74.) Defendant Armstrong objected on relevance and evidentiary grounds. (*Id.* at 21.) She also objected that the interrogatory invades her right to privacy and seeks information that is privileged and confidential. (*Id.* (citing Cal. Pen. Code §§ 832.7, 832.8).)

In document production request 3 in set two, Bryant asks Armstrong to produce all "job description, roster or other document(s)" disclosing the dates and times that she attended

1 training classes at Calipatria from December 2007 to February 2008.  
2 (Id. at 16-17.) Armstrong objected because the request invades her  
3 right to privacy and improperly seeks her personnel file, which is  
4 privileged and confidential. (Id. at 31 (citing Cal. Pen. Code §§  
5 832.7, 832.8).)

6 Bryant maintains that the information sought in interrogatory  
7 2 and document request 3 is relevant because Armstrong makes  
8 several assertions about incidents that Plaintiff insists could not  
9 have occurred because Armstrong was at a training class on the date  
10 and time she asserts Bryant committed the act. (Id. at 6.) Also,  
11 the information is relevant because it bears on Defendant's  
12 credibility. (Id.) Defendant Armstrong argues in her Opposition  
13 that the dispute over interrogatory 2 and document request 3 is  
14 moot because after Bryant filed this Motion, defense counsel  
15 provided Plaintiff with documents showing the dates and times  
16 Defendant Armstrong and other Defendants attended training from  
17 December 2007 to July 2008. (Defs. Armstrong & Ochoa's Opp'n 2,  
18 ECF No. 83.) The class record produced to Bryant reveals every  
19 training class that Armstrong attended from 2006 to September 10,  
20 2009, including the date, length, and title of each class. (Id.  
21 Attach. #1 Decl. Walters 3.)

22 The Plaintiff is apparently satisfied with Defendant's  
23 production and has not filed anything contesting counsel's  
24 representation that the information provided is responsive to the  
25 discovery requests. Consequently, Plaintiff's Motion to Compel  
26 responses from Defendant Armstrong to interrogatory 2 and document  
27 request 3 in set two [ECF No. 74] is **DENIED** as moot.

28 //

1           **2.     Ochoa**

2           In interrogatory 7, Bryant asks Defendant Ochoa to state the  
3 reasons the memorandum signed by "former CDCR Secretary Roderick  
4 Hickman," dated February 17, 2004, and titled, "'Zero Tolerance  
5 Regarding The Code Of Silence,'" was distributed to CDCR employees.  
6 (Mot. Compel Disc. Armstrong & Ochoa 43, ECF No. 74.) Ochoa  
7 objected on foundation, speculation, relevance, and evidentiary  
8 grounds. (Id. at 29.) Without waiving the objections, Ochoa  
9 answered, "I do not know. I was not involved in authoring or  
10 distributing the memo." (Id.)

11           In the Motion to Compel, Plaintiff contends that Ochoa's  
12 response is evasive and incomplete because Defendant has resources  
13 available to him to assist him in answering the interrogatory.  
14 (Id. at 7.) Moreover, a simple reading of the memorandum could  
15 enable Ochoa to answer completely. (Id.) In his Opposition,  
16 Defendant maintains that Plaintiff is essentially asking Ochoa to  
17 explain why a memorandum that he did not write or distribute was  
18 sent to prison staff. (Defs. Armstrong & Ochoa's Opp'n 3, ECF No.  
19 83.) Ochoa urges that he also does not have a duty to research the  
20 reasons that someone else at CDCR wrote or distributed a memorandum  
21 in 2004. (Id.) Therefore, Defendant's answer, "I do not know,"  
22 was sufficient. (Id.)

23           As discussed previously, Ochoa has an affirmative duty to  
24 provide Bryant with all responsive information reasonably available  
25 to him. 7 James Wm. Moore, et al., Moore's Federal Practice, §  
26 33.102[1], at 33-72 (footnote omitted). He does not, however, have  
27 a duty to search for new information. Id. If Ochoa is unable to  
28 answer interrogatory 7 by stating the reasons that the memorandum

1 was distributed to Calipatria staff, he must provide that answer  
 2 under oath and must set forth the efforts he made to attempt obtain  
 3 the answer. See Haworth, 2007 U.S. Dis. LEXIS 48380, at \*5  
 4 (quoting Hansel, 169 F.R.D. at 305); see also Frontier-Kemper  
 5 Constructors, Inc., 246 F.R.D. at 529. Here, Defendant verified  
 6 his response, "I do not know," but he did not specify the steps he  
 7 took to attempt to ascertain the reason for the distribution.  
 8 (Mot. Compel Disc. Armstrong & Ochoa 50, ECF No. 74.)

9 Plaintiff's Motion to Compel a further response from Defendant  
 10 Ochoa to interrogatory 7 in set two [ECF No. 74] is **GRANTED**. Ochoa  
 11 is to utilize all reasonably available means to determine the  
 12 reasons the memorandum was distributed. If after doing so,  
 13 Defendant still is unable to respond to the interrogatory, he must  
 14 state so under oath and must describe the attempts he made to  
 15 locate the information.

16 **F. Defendant Ochoa: Motion to Compel Responses to Document**  
 17 **Requests 1, 2, and 3 (Set Three) [ECF No. 82]**

18 Bryant also filed a "Motion to Compel Discovery," in which he  
 19 seeks an order compelling Defendant Ochoa to respond to document  
 20 requests 1, 2, and 3 in set three [ECF No. 82]. Ochoa filed an  
 21 Opposition to Plaintiff's Motion to Compel in response [ECF No.  
 22 88]. No reply was filed.

23 **1. Requests for production of documents 1, 2, and 3**

24 The three document requests are essentially the same. In  
 25 document request 1 in set three, Plaintiff asks Ochoa to produce  
 26 any "policy, regulation, directive, or other document(s) which  
 27 would support" Defendant Ochoa's assertion made in his second level  
 28 response to Plaintiff's Log No. Cal-A-08-00207 appeal, in which

1 Ochoa found that Defendant Armstrong did not violate any CDC policy  
2 on May 21, 2008. (Mot. Compel Disc. Ochoa 10, Nov. 4, 2011, ECF  
3 No. 82.) Defendant provided the following answer in response to  
4 the document request:

5 Defendant did not review any specific policy or  
6 regulation in conducting the Second Level Review.  
7 Defendant conducted the review based on the evidence and  
8 circumstances, and on Defendant's general familiarity  
9 with CDCR policy and knowledge that that [sic] staff  
10 should not racially discriminate against inmates.  
11 Therefore, there are no responsive documents.

12 (Id. at 15.) Ochoa did not object to the request on any ground and  
13 did not verify his response. (See id. at 15-17.)

14 Next, Bryant asks Ochoa in document request 2 to produce any  
15 "policy, regulation, directive, or other document(s) to support"  
16 Ochoa's claim made in his second level response to Plaintiff's Log  
17 No. Cal-A-08-00311 appeal, in which Ochoa found that Defendant  
18 Armstrong did not violate any CDC policy on May 21, 2008. (Id. at  
19 10.) In response, Defendant provided the following answer:

20 Defendant did not review any specific policy or  
21 regulation in conducting the Second Level Review.  
22 Defendant conducted the review based on the evidence and  
23 circumstances, and on Defendant's general familiarity  
24 with CDCR policy and knowledge that that [sic] staff  
25 should not racially discriminate, issue false chronos, or  
26 retaliate against inmates. Therefore, there are no  
27 responsive documents.

28 (Id. at 15.) The Defendant did not object to the request and did  
not verify his response. (See id. at 15-17.)

Finally, in document request 3, Plaintiff asks Ochoa to  
produce any "policy, regulation, directive, or other document(s)  
which support" Ochoa's claim made in his "'Second Level Response'"  
to Plaintiff's Log No. Cal-A-08-01027 appeal, in which Ochoa found  
that Defendant Armstrong did not violate any CDC policy on

1 September 4, 2008. (Id. at 10-11.) Ochoa answered:

2 Defendant did not review any specific policy or  
3 regulation in conducting the Second Level Review.  
4 Defendant conducted the review based on the evidence and  
5 circumstances, and on Defendant's general familiarity  
6 with CDCR policy and knowledge that that [sic] staff  
7 should not racially discriminate or retaliate against  
8 inmates. Therefore, there are no responsive documents.

9 (Id. at 15.) Again, Ochoa did not object. (See id. at 15-17.) He  
10 also did not verify his response. (See id.)

11 Plaintiff argues that Defendant's responses are evasive and  
12 incomplete because Bryant simply asks Ochoa for the policies that  
13 would support his conclusion that Armstrong and Lizarraga did not  
14 violate CDCR policy. (Id. at 4.) Further, defense counsel  
15 indicated in a subsequent letter that "while it is generally policy  
16 that racial discrimination is prohibited, there is no written  
17 regulation or policy." (Id. at 27.) Yet, notably, Bryant argues  
18 that counsel did not also state that there is no policy or  
19 regulation prohibiting retaliation against inmates. (Id. at 5.)

20 Ochoa contends that his responses are sufficient because they  
21 informed Bryant that Defendant did not review any particular policy  
22 or regulation when considering and denying Plaintiff's inmate  
23 appeals. (Def. Ochoa's Opp'n 2, Nov. 28, 2011, ECF No. 88.) The  
24 Defendant properly answered the document request by stating that  
25 there are no responsive documents and later informed Bryant that  
26 there are no relevant written policies. (Id.) Moreover, according  
27 to Ochoa, Plaintiff seeks to compel Defendant to identify policies  
28 to show whether other Defendants violated CDCR policies; to this  
extent, the requests improperly seek a legal conclusion and  
potentially attorney work product. (Id.)

As discussed previously, when a response to a production of documents is an answer instead of production or an objection, the party must answer under oath. 7 James Wm. Moore, et al., Moore's Federal Practice, § 34.13[2][a], at 34-57 (footnote omitted); see id. § 34.14[2][a], at 34-73 (footnote omitted). The document requests explicitly seek documents that would support Ochoa's decision on Bryant's second level appeal. Thus, Defendant's unsworn answer to the document requests stating that he did not actually review any policy when making his determination is insufficient. Defense counsel's subsequent statement to Plaintiff that there are no written policies or regulation prohibiting racial discrimination is also inadequate because it was not made by Ochoa under oath and does not address policies regarding retaliation.

Bryant's Motion to Compel Ochoa to provide supplemental responses to document requests 1, 2, and 3 in set three [ECF No. 82] is **GRANTED**. Ochoa shall provide Bryant with a verified response to the three document requests that also includes the Defendant's attempts to locate responsive documents.

**G. Defendant Janda: Motion to Compel Responses to Document Requests 3, 4, and 5 (Set Three) [ECF No. 86]**

The Plaintiff filed a "Motion to Compel Discovery," in which he moves for an order compelling Defendant Janda to respond to document requests 3, 4, and 5 in set three [ECF No. 86]. Janda filed an Opposition to Plaintiff's Motion to Compel and a declaration of John P. Walters [ECF No. 89]. Bryant did not file a reply.

Document request 3 in set three asks Associate Warden Janda to produce all "grievances, complaints, or other documents received by

1 prison staff Defendant Ochoa or his agents" at Calipatria since  
2 June 7, 2007, regarding the "mistreatment of inmates by Defendants  
3 Lizarraga, Catlett, Armstrong, or Trujillo," as well as the  
4 corresponding investigative files and documents created in  
5 response. (Mot. Compel Disc. Janda 12, Nov. 21, 2011, ECF No. 86.)  
6 Defendant objected because the request is vague, overbroad, and  
7 irrelevant. (Id. at 17.) Janda indicated that he would, however,  
8 respond if Bryant narrowed the request to claims related to the  
9 ones in this lawsuit. (Id.)

10 In document request 4 in set three, Bryant asks Defendant to  
11 provide him with all inmate "grievances, complaints, or other  
12 documents" received by Janda or his agents at Calipatria regarding  
13 "allegations of racial discrimination or retaliation by staff on  
14 inmates since June 7, 2007." (Id. at 13.) Defendant objected on  
15 overbreadth and relevance grounds, but indicated he would provide a  
16 supplemental response if Bryant narrowed the request. (Id. at 18.)

17 In document request 5 in set three, the Plaintiff asks Janda  
18 to disclose the following:

19 Any and all personnel files of Defendant Ochoa,  
20 Janda, Trujillo, Catlett, Lizarraga, and Armstrong that  
21 relate to discipline and/or training of the individual  
22 defendants. (Meaning training records, disciplinary  
23 records which include, but are not limited to, employee  
24 performance appraisals or information related to  
25 defendants' ethics, interpersonal relationships, decision  
26 making abilities, promotions, interviews with respect to  
27 internal investigations and work and safety habits.)

24 (Id. at 13.) Janda objected because the request seeks information  
25 that is not relevant and invades his right to privacy. (Id. at  
26 18.) Moreover, the request is vague and ambiguous. (Id.) Janda  
27 did note, however, that he would supplement his response if Bryant  
28 narrowed the request. (Id.)



1 In the Opposition, defense counsel submits that the dispute as  
2 to all three document requests is moot, and Bryant's Motion should  
3 therefore be denied. (Def. Janda's Opp'n 2, Dec. 5, 2011, ECF No.  
4 89.) Plaintiff filed this Motion to Compel while the parties were  
5 still engaged in the meet-and-confer process. (Id.) After filing  
6 the Motion, Bryant agreed to narrow his requests to records  
7 relating to the discipline or training of the individual  
8 Defendants. (Id. Attach. #1 Decl. Walters 2; see Mot. Compel Disc.  
9 Janda 28, Nov. 21, 2011, ECF No. 86.) In a subsequent letter,  
10 Defendant's counsel responded by stating that Janda would provide  
11 supplemental responses to the extent the requests for records were  
12 limited to discipline of the Defendants for conduct similar to that  
13 claimed in the case, retaliation and discrimination. (Def. Janda's  
14 Opp'n Attach. #1 Decl. Walters 2, Dec. 5, 2011, ECF No. 89.)  
15 Counsel states that he then provided Bryant with some of the  
16 supplemental responses and intended to provide him with the  
17 remaining responses shortly; because Bryant never responded to  
18 Walters's letter, counsel assumed there was an agreement as to the  
19 limited scope. (Id. at 2-3.) Therefore, Janda explains that the  
20 dispute is moot.

21 The Plaintiff has not filed a reply or any brief contesting  
22 the statements made by defense counsel, and there is no indication  
23 that Bryant considers the issue still in dispute. The documents  
24 attached to the Motion and the Opposition are consistent with  
25 counsel's representations. Consequently, Bryant's Motion to Compel  
26 supplemental responses from Janda to document requests 3, 4, and 5  
27 in set three [ECF No. 86] is **DENIED** as moot.

28 //



1           **DENIED** as moot; for interrogatory 7 to Ochoa, Bryant's  
2           Motion is **GRANTED**.

3           6.   Plaintiff's request for an order compelling Ochoa to  
4           provide supplemental responses to document requests 1, 2,  
5           and 3 in set three [ECF No. 82] is **GRANTED**.

6           7.   Bryant's Motion to Compel supplemental responses from  
7           Defendant Janda to document requests 3, 4, and 5 in set  
8           three [ECF No. 86] is **DENIED** as moot.

9           The Defendants' discovery responses must be served no later  
10          than June 29, 2012.

11  
12          DATE:   June 14, 2012



RUBEN B. BROOKS  
United States Magistrate Judge

13  
14          cc:   Judge Whelan  
15               All Parties of Record  
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